NO. 34395-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DAVID VASQUEZ ALCOCER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Carrie Runge, Judge
The Honorable Cameron Mitchell, Judge

AMENDED SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The sentencing court erred when it entered a condition prohibiting the appellant from "us[ing] or possess[ing] any pornographic materials, to include magazines, internet sites, and videos" because the condition is not crime-related. CP 96.

Issue Pertaining to Supplemental Assignment of Error

Should the condition related to pornographic materials be stricken altogether because, for purposes of the Sentencing Reform Act, it is not crime-related and therefore not authorized by statute?

B. SUPPLEMENTAL STATEMENT OF THE CASE

Mr. Alcocer challenged the pornography-related condition in his opening brief, asking that it be stricken. Brief of Appellant at 2.

The State has now conceded that the pornography-related community custody condition is unconstitutionally vague. But, the State argues, this Court should remand for amendment of the condition to prohibit materials containing "sexually explicit conduct." Brief of Respondent (BOR) at 18.

Alcocer now seeks permission to raise a supplemental assignment of error, and related argument, that the condition should be stricken altogether because it is not crime-related.

C. SUPPLEMENTAL ARGUMENT

THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN IMPOSING A COMMUNITY CUSTODY CONDITION THAT WAS NOT CRIME-RELATED.

The trial court erred when it entered a condition prohibiting Mr. Alcocer from using or possessing pornographic materials. Even if the condition were amended to prohibit depictions of sexually explicit conduct, the condition would still be invalid, as it was unauthorized by statute. Rather than being amended, as the State urges, the condition must be stricken altogether.

1. The pornographic materials condition, even if amended, will not be crime-related.

Even if the condition is amended, as the State suggests it should be, its primary defect remains: It is not crime-related. The trial court's authority to impose sentence in a criminal proceeding is strictly limited to that authorized by the legislature in the sentencing statutes. State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). Any sentencing condition that is not expressly authorized by statute is void. Id.

Whether the trial court had statutory authority to impose a given condition is reviewed de novo on appeal. Id. In contrast, a trial court's decision to impose a condition is reviewed for abuse of discretion only if that court had statutory authorization to impose it. Id. at 326. Even where

defense counsel fails to object to an improper community custody conditions in the court below, erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

RCW 9.94A.703 lists conditions of community custody, some mandatory, some waivable, and some discretionary. Neither pornographic nor sexually explicit materials are listed. RCW 9.94A.703.

A court may, however, impose other "crime-related prohibitions" beyond those specifically listed. RCW 9.94A.703(3)(f). A condition is "crime-related" only if it "directly relates to the circumstances of the crime." RCW 9.94A.030(10). The condition need not be causally related to the crime, but it must be *directly* related to the crime. State v. Zimmer, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). Thus, crime-related conditions of community custody must be supported by evidence showing the factual relationship between the crime punished and the condition imposed. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989). Substantial evidence must support a determination that a condition is crime-related. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), overruled on other grounds, State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

In other words, there must be a nexus between the crime and the prohibition. Johnson, 180 Wn. App. 330-31. But here, there is no evidence

Alcocer accessed pornography or sexually explicit materials as part of the offenses. E.g. CP 76-84 (presentence investigation report). In this case, which involved a guilty plea, the record thus reveals no connection between the challenged prohibition and the crime. As a result, rather than being amended, the condition must be stricken in its entirety. See State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) ("There is no evidence that O'Cain accessed the internet before the rape or that internet use contributed in any way to the crime. . . . Because the prohibition in this case is not crime-related[,] it must be stricken. Our holding does not preclude control over internet access being imposed as part of sex offender treatment if recommended after a sexual deviancy evaluation.").

2. The condition should be stricken notwithstanding this Court's *Magana* decision.

In cases where there is no evidence or information indicating sexually explicit or erotic materials were related to the crime, the Court of Appeals has repeatedly struck community custody conditions. In State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014), the defendant was convicted of molesting two children. The trial court imposed a community custody prohibition on possessing sexually explicit materials, and Kinzle challenged this condition on appeal, asserting it was not crime-related. Id. The appellate court agreed

with Kinzle and struck the community custody condition because no evidence suggested such materials were related to or contributed to his crime. Id.

In several cases involving the same fact pattern, the Court of Appeals has struck down similar community custody conditions because they are not crime-related. See, e.g., State v. Stewart, noted at 196 Wn. App. 1046, 2016 WL 6459834 , at *3 (2016) (holding trial court exceeded statutory authority imposing prohibition on possessing sexually explicit material because "there was no evidence before the trial court that Stewart's use or possession of sexually explicit material related to his crime of indecent liberties"); State v. Hesselgrave, noted at 184 Wn. App. 1021, 2014 WL 5480364, at *12 (2014) (unpublished) (prohibition on going to establishments promoting "commercialization of sex" not reasonably crime-related where no evidence suggested such establishments related to defendant's crime of child rape); State v. Clausen, noted at 181 Wn. App. 1019, 2014 WL 2547604, at *8 (2014) (unpublished) (conditions prohibiting possessing sexually explicit material and patronizing establishments that promote commercialization of sex not crime-related because no evidence suggested Clausen possessed sexually explicit material in connection with crime of child rape); State v. Whipple, noted at 174 Wn. App. 1068, 2013 WL 1901058, at *6 (2013) (unpublished) (prohibition on possessing and frequenting establishments that

deal in sexually explicit materials not crime-related where nothing in record suggested child rape offenses involved such materials or establishments).[1]

Alcocer acknowledges that an opinion by this Court reaches a contrary conclusion. State v. Magana, 197 Wn. App. 189, 201, 389 P.3d 654 (2016). But the Magana court simply concluded, without analysis, that "[b]ecause Mr. Magana was convicted of a sex offense, conditions regarding access to X-rated movies, adult book stores, and sexually explicit materials were all crime related and properly imposed." Id. But this assumes the commission of a sex crime renders an offender ipso facto incapable of reasonably and responsibly possessing and using sexually explicit materials, even where such materials played absolutely no role in the crime, and even where there is no evidence the condition will be part of any treatment. Cf. O'Cain, 144 Wn. App. at 775.

More fundamentally, the decision usurps the role of the legislature. In defining a crime-related prohibition, the legislature plainly indicated that the prohibition must directly relate to the circumstances of the crime. RCW 9.94A.030(10). The Magana Court ignored this language, exempting a set of crimes—sex crimes—from the clear statutory requirement that community custody prohibitory conditions must relate to the crime. This Court should

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[1] Pursuant to GR 14.1(a), Alcocer cites these unpublished cases as nonbinding authorities. However, given their relevance to this case, Alcoer asks that the cases be accorded significant persuasive value.

remain faithful to the clear legislative directive by striking the condition, which was not authorized by statute.

D. CONCLUSION

For the reasons stated above and in the opening brief, this Court should strike the condition related to pornographic materials.

DATED this 25TH day of September, 2017.

Respectfully submitted,

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